

**Tennessee Department of Environment and Conservation
Division of Underground Storage Tanks
Office of the Director**

Statutory / Regulatory Interpretation Memo

DATE: July 20, 2001

TO: All UST Division Staff

FROM: Wayne Gregory

SUBJECT: Dual Purpose Tanks

QUESTION:

Are dual purpose tanks:

(1) exempted from UST law and regulations as heating oil tanks

or

(2) regulated as emergency generator tanks?

SCOPE OF THIS INTERPRETATION

For the purpose of this interpretation, “dual purpose tank” refers to a tank which is used for the production of heat and used for the generation of power in a power-outage emergency.

APPLICABLE LAWS AND REGULATIONS

Shown below is a comparison of language in the federal regulations (40 CFR 280) with the same or similar language in the Tennessee state law (TCA 68-215-101 *et seq.*) or in the Tennessee Regulations Governing Petroleum Underground Storage Tanks (Rule 1200-1-15).

Deferrals

40 CFR 280.10 (d) Deferrals. Subpart D does not apply to any UST system that stores fuel solely for use by emergency power generators.

Rule 1200-1-15-.01(1)(c) Deferrals. Rule 1200-1-15-.04 does not apply to any UST system that stores fuel solely for use by emergency power generators.

Heating Oil

40 CFR 280.12

“Heating oil” means petroleum that is No. 1, No. 2, No. 4 – light, No. 4 – heavy, No. 5 – light, No. 5 – heavy, and No. 6 technical grades of fuel oil; other residual fuel oils (including Navy Special Fuel Oil and Bunker C); and other fuels when used as substitutes for one of these fuel oils. Heating oil is typically used in the operation of heating equipment, boilers, or furnaces.

Rule 1200-1-15-.01(3)(y)

“Heating oil” means petroleum that is No. 1, No. 2, No. 4 – light, No. 4 – heavy, No. 5 – light, No. 5 – heavy, and No. 6 technical grades of fuel oil; other residual fuel oils (including Navy Special Fuel Oil and Bunker C); and other fuels when used as substitutes for one of these fuel oils. Heating oil is typically used in the operation of heating equipment, boilers, or furnaces.

On the premises where stored

40 CFR 280.12

“On the premises where stored” with respect to heating oil means UST systems located on the same property where the stored heating oil is used.

Rule 1200-1-15-.01(1)(ff)

“On the premises where stored” with respect to heating oil means UST systems located on the same property where the stored heating oil is used.

Exemptions and Underground storage tank definition

40 CFR 280.12 (Also, there is comparable language under “Definitions and exemptions” in US Code : Title 42, Section 6991 (1).)

“Underground storage tank” or “UST” means any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the

volume of underground pipes connected thereto) is 10 percent or more beneath the surface of the ground. This term does not include any:

(b) Tank used for storing heating oil for consumptive use on the premises where stored.

TCA 68-215-124. Exemptions. --- Exempted from the provision of this chapter are:

(3) Tanks used for storing heating oil for consumption on the premises where stored;

Rule 1200-1-15-.01(3)(bbb)

“Underground storage tank” or “UST” means any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of petroleum, and the volume of which (including the volume of underground pipes connected thereto) is ten percent (10%) or more beneath the surface of the ground. This term does not include any:

(b) Tank used for storing heating oil for consumption on the premises where stored;

As can be seen in the comparison above, the Tennessee state statute and regulations are no less stringent than the federal requirements.

Discussion

The preamble to the Federal regulations contains a discussion of the rulemaking rationale and some of the responses to public comments incorporated into the final federal rule. The preamble states that the only restriction placed upon usage, relative to heating oil tanks, is that the substance be used on site. However, further discussion lists examples of usage, including usage in boilers, furnaces, steam production and for the operation of heating equipment, the production of process heat and other heating purposes. Even the production of electricity and the powering of a generator are included if “heating oil” is the substance.

The federal rule itself defines “heating oil”:

“Heating oil” means petroleum that is No. 1, No. 2, No. 4 – light, No. 4 – heavy, No. 5 – light, No. 5 – heavy, and No. 6 technical grades of fuel oil: other residual fuel oils (including Navy Special Fuel Oil and Bunker C): and other fuels when used as substitutes for one of these fuel oils. Heating oil is typically used in the operation of heating equipment, boilers, or furnaces.

As can be seen in this definition, substitutes for the listed substances are included in the definition of heating oil. When a substitute, such as diesel, kerosene, or even used oil, is used to fuel heating equipment such as boilers or furnaces, it is a heating oil by definition.

The only other restriction which must be considered is whether or not the fuel is used or consumed on the same property on which the underground storage tanks are located. A more detailed analysis of the substances and/or usages which qualify for the heating oil tank exemption is outlined in the table below.

In this analysis the following has been derived from the discussion of the Federal rule, in the preamble, as well as from the rule itself:

The following qualify for the heating oil exclusion:	
Petroleum sold as:	Usage:
No. 1 Fuel Oil	Any *
No. 2 Fuel Oil	Any *
No. 4 – Light Fuel Oil	Any *
No. 4 – Heavy Fuel Oil	Any *
No. 5 – Light Fuel Oil	Any *
No. 5 – Heavy Fuel Oil	Any *
No. 6 Fuel Oil	Any *
Navy Special	Any *
Bunker C	Any *
Substitutes for one of the fuel oils listed above, such as diesel, kerosene and used oil	Boilers
Substitutes for one of the fuel oils listed above, such as diesel, kerosene and used oil	Furnaces
Substitutes for one of the fuel oils listed above, such as diesel, kerosene and used oil	Operation of heating equipment
Substitutes for one of the fuel oils listed above, such as diesel, kerosene and used oil	Steam production
Substitutes for one of the fuel oils listed above, such as diesel, kerosene and used oil	Production of process heat
Substitutes for one of the fuel oils listed above, such as diesel, kerosene and used oil	Any other heating purpose

- * “Any” includes the production of electricity and powering a motor generator.
 “Any” does not include product stored for resale, marketing or distribution because the “heating oil” must be consumed on the premises where stored.

Tennessee statute exempts certain tanks from all provisions of the Petroleum Underground Storage Tank Act in TCA 68-215-124. Tanks used for storing heating oil for consumption on the premises where stored are exempted. This statute has been in effect since July 1, 1988. The Tennessee regulation which defers UST systems that store fuel solely for use by emergency power generators from release detection requirements took effect in August of 1991. Tennessee regulations also state, in Rule 1200-1-15-.01(3)(aaa)2, that heating oil tanks are **not** underground storage tanks by definition.

Since, in the hierarchy of legal authority or strength, a statute is the higher authority and “out-ranks” a regulation, the position adopted here is that if and when a tank qualifies in any way for the heating oil exemption, that statutory exemption overrides a regulatory deferral. A regulatory deferral can only be applicable to a regulated tank. If a tank qualifies for a statutory exemption, it is not a regulated tank and therefore cannot be evaluated for a regulatory deferral. The legal hierarchy appears to be exactly the same in the Federal and the Tennessee requirements. This position is supported by the regulatory definition of an underground storage tank, which specifically states that the term “underground storage tank” does not include tanks used for storing heating oil for consumption on the premises where stored (Tennessee Rule 1200-1-15-.01(3)(bbb)2).

Another focus of this analysis is the distinction which can be observed in the statutory and regulatory language used relative to heating oil tanks verses that language used relative to emergency power generator tanks. The word “**solely**” is used in the language deferring emergency power generator tanks from the release detection requirements. No such limiting language is used relative to heating oil tanks. This comparison leads to the conclusion that heating oil tanks are exempted from the UST requirements even if the tank has other functions in addition to or as well as fueling boilers or furnaces, as long as the heating oil is consumed on the premises where stored. However, an emergency power generator deferral is applicable to tanks that **only or solely** serve as emergency power generator tanks. It can be concluded that the deferral does not apply to dual purpose tanks (heating oil and emergency power generator), but that the stronger statutory exemption does. If the authors of the Federal and the Tennessee law had intended to limit the heating oil exemption to tanks which were “solely” heating oil tanks, then language similar to that written for tanks used to fuel emergency power generators would have been written for heating oil tanks as well. It was not.

If we were to assume, just for the sake of argument, that the same weight were given to the statutory exemption of heating oil tanks and the regulatory deferral of emergency power generator tanks, then because of the use of the word “solely”, dual purpose tanks could not qualify for the emergency power generator deferral from regulatory release detection requirements. The impact of this would have to be one of two outcomes: (1) dual purpose tanks do qualify for the heating oil tank exemption or (2) dual purpose tanks are fully regulated and must perform release detection in accordance with state and federal regulations. There is nothing in the Tennessee nor in the Federal rules which suggests that tanks used for both heating purposes and emergency power generation are required to perform release detection. Therefore, the first outcome mentioned above, that dual purpose tanks do qualify for the heating oil tank exemption, must be the conclusion reached.

In most, if not all, of the contested case hearings before the Tennessee Petroleum Underground Storage Tank Board, the Administrative Law Judge admonishes the Board to consider the plain meaning of the words used in the law and the regulations. When looking at the plain meaning of Tennessee law and regulations, heating oil tanks are not regulated. Heating oil tanks are exempted by law from any and all provisions of the

Tennessee Underground Storage Tank Act and therefore from the regulations promulgated pursuant to the Act. Heating oil tanks are not considered, by regulatory definition, to be underground storage tanks. Finally, heating oil is defined by rule. This definition includes substitutes for the listed fuel oils as well as those listed fuel oils. Therefore, if a tank stores a petroleum product which is used or consumed on the same property where the storage tank is located, and the petroleum product is used to produce heat or is listed in the regulatory definition of "heating oil", the tank is exempt from all requirements set forth in the Tennessee Underground Storage Tank Law and Regulations. This applies to all such tanks regardless of other functions, such as providing fuel for powering a generator during a power-outage emergency.

CONCLUSION

Dual purpose tanks are exempt from UST law and regulations if:

- (1) one of the petroleum products listed in the definition of heating oil is stored in the tank;
- or
- (2) the tank is used to operate boilers, furnaces, heating equipment or to produce steam, process heat or for any other heating purpose using a petroleum product not specifically listed in the regulatory definition of heating oil.